United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-1186 B

P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

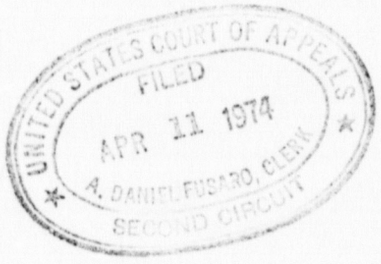
HUMBERTO FLORES,

Appellant.

Docket No. 74-1186

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether the Government violated the Prompt Disposition Rules by failing, without a valid excuse, to be ready for trial within six months of appellant's arrest.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (The Honorable Marc A. Costantino) rendered on February 8, 1974, after a jury trial, convicting Humberto Flores of one count of importing cocaine into the United States, in violation of 21 U.S.C. §§952(a), 960(a)(1); 18 U.S.C. §2; and of one count of conspiracy to import cocaine, in violation of 21 U.S.C. §§952(a), 963.

Appellant was sentenced to imprisonment for a period of eight years on each count, pursuant to 18 U.S.C. §4208(a)(2), the sentences to run concurrently, and to a special parole term of three years.

The Legal Aid Society, Federal Defender Services Unit, was assigned as counsel on appeal, pursuant to the Criminal Justice Act.*

Statement of Facts

Appellant, along with co-defendants Carlos Hidalgo

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*At trial appellant was represented by Anthony Greco, Esq., who was assigned as counsel by Judge Costantino.

and Miguel Vera, were indicted for their participation in a scheme to import cocaine into the United States from Ecuador, Chile, and other places. The Government was unable to apprehend Hidalgo and Vera, and appellant stood trial alone.*

Arguing that nine months and twenty-five days elapsed between appellant's arrest and the date of the filing of the Government's notice of readiness, defense counsel, prior to trial, made a motion to dismiss the indictment on the ground that the Government had failed to comply with the six month provision of Rule 4 of the District Court's Plan for Achieving Prompt Disposition of Criminal Cases (the "Plan").

The chronology of events from the time of appellant's arrest until the time of his trial was developed as follows:

Appellant was arrested on September 28, 1972, at Kennedy International Airport, where allegedly he was to meet Raimundo Canas, also known as Rolando Sanchez, who himself had just previously entered the United States carrying cocaine from Chile. Complaints were filed against appellant and Canas.**

According to Agent Daniocek, the principal case agent, who interviewed Canas on September 28 and 29, 1973, Canas explained appellant's role in the importation scheme,

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*The indictment originally contained four counts. For purposes of trial, however, counts two and four, in which appellant was named, were re-numbered as count one (substantive) and count two (conspiracy).

**See affidavit of Assistant United States Attorney Clarey, annexed as "D" to appellant's separate appendix.

but was unwilling to testify against appellant.*

Some time prior to October 10, 1972, the Government determined that, due to Canas' refusal to testify, there was insufficient evidence to indict appellant. Accordingly, on October 10, 1972, the Government consented to a reduction of appellant's bail, and he was released. (See Clarey's affidavit, at 2). Also on October 10, Canas was indicted (72 Cr. 1152 E.D.N.Y.) for his role in the scheme. On October 25, he pleaded guilty before the Honorable Joseph C. Zavatt, and on January 8, 1973, was sentenced to imprisonment for eight years and to a special parole term of three years.**

Soon after Canas conviction, he was interviewed by Daniocek. Canas again refused to testify against appellant, allegedly for fear of endangering Canas' family. (See Daniocek affidavit, at 2). Thus, having been unable to discover new evidence against appellant, and having been unable to persuade Canas to testify, the Government sought and obtained dismissal of the complaint against appellant before the Honorable Max Schiffman, United States Magistrate, Eastern District of New York, pursuant to Rule 48(a) of the Federal Rules of Criminal Procedure. A period of five months thus elapsed between arrest and dismissal. (See Clarey's affidavit, at 2).

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*See affidavit of Agent Daniocek, annexed as "E" to appellant's separate appendix.

**These facts were developed during Canas' testimony at trial, November 18, 1972, at 58-61.

Although the complaint against appellant was dismissed, the Government continued its efforts to gather evidence. In April 1973 Canas, who had begun to serve his sentence at the Federal Penitentiary, Terre Haute, Indiana, was brought to New York. According to Daniocek, Canas maintained his refusal to testify. (See Clarey affidavit, at 3; Daniocek affidavit, at 3).

On May 4, 1973, Canas filed a pro se motion for reduction of sentence wherein he alleged that he was presently cooperating with the Government.* Also on May 4, 1973, Clarey wrote to Judge Zavatt, and, noting that Canas was assisting the Government, joined Canas' request for a reduction of sentence.** A similar letter was sent on June 29, 1973, to Judge Zavatt by the late United States Attorney for the Eastern District, Robert A. Morse, requesting that Canas' sentence be reduced to two or three years.*** As a consequence of the intervention by the United States Attorney's office, on June 29, 1973, Judge Zavatt reduced Canas' sentence to three years'

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*See Canas' motion for reduction of sentence, which is annexed as "G" to appellant's separate appendix.

Also, Canas had previously, on February 21, 1973, made a motion for reduction of sentence, which was denied by Judge Zavatt on March 7, 1973. (See the District Court file, United States v. Sanchez, E.D.N.Y. 72 Cr. 1152).

**Clarey's letter is annexed as "H" to appellant's separate appendix.

***Morse's letter is annexed as "I" to appellant's separate appendix.

imprisonment and three years' special parole.*

Although Canas' motion for reduction of sentence and Clarey's supporting letter were dated May 4, 1973, Clarey alleged in his affidavit that Canas first agreed to testify against appellant in "the latter part of May 1973," whereupon he was brought to the United States Attorney's office for an interview.** (See Clarey's affidavit, at 3). Canas testified before the grand jury on June 19, 1973.

On June 19, 1973, appellant, along with Hidalgo and Vera, were indicted for their participation in the importation scheme. The Government acknowledged that appellant was indicted for the same acts and transactions as were alleged in the original complaint, and that the investigation and preparation of the case proceeded continuously from the day of arrest, June 28, 1972. Appellant remained at large as a fugitive until June 28, 1973, when he was arrested. On July 24, 1973, the Government filed a notice of readiness for trial. In total, nine months and twenty-five days elapsed between the initial arrest and the date of the filing of the Govenrment's notice of readiness.

Based on this history, Clarey sought to excuse the almost ten-month delay between the initial arrest and the date

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*Judge Zavatt's opinion is annexed as "J" to appellant's separate appendix.

**Daniocek asserted that Canas "voluntarily" agreed to cooperate in late May. (See Daniocek's affidavit, at 3).

of the filing of the notice of readiness, by asserting that the dismissal of the complaint on February 23, 1973, relieved appellant from the threat of criminal prosecution, and that the six-month period contemplated by Rule 4 of the Plan should be calculated only from the date of the indictment, June 19, 1974. He asserted also that even if the six-month period began to run on the date of arrest, September 28, 1972, the period should be tolled for the three months and twenty-six days between the dismissal of the complaint and the filing of the indictment, leaving only five months and nineteen days (September 28, 1972, to February 23, 1973, and June 19 to July 24, 1973).

Alternatively, Clarey urged that the Government was entitled to an exception from the six-month rule under Rule 5(c)(i) for the eight-month period between September 29, 1972, and June 19, 1973, because the testimony of Canas was "unavailable" during that time. Finally, Clarey claimed that the exception under Rules 5(d) and (e) applied because appellant was a fugitive between June 19 to June 28, 1973, and because the co-defendant Hidalgo was actively, but fruitlessly, sought by agents during that period.

On October 15, 1973, Judge Costantino denied defense counsel's motion for dismissal:

> The defendant argues that under the district's plan the government was required to be ready for trial within six months of his first arrest. He contends that notwith-

> standing the dismissal of the complaint filed against him, the period during which he was detained by reason thereof should be included in computing the time within which the government should have been ready for trial.
>
> The defendant's position cannot be sustained. A dismissal pursuant to Rule 48(a) of the Federal Rules of Criminal Procedure is without prejudice. Additionally, there is no provision in the district's plan that provides for inclusion of a period of detention unrelated to the current charges pending against a defendant. Section 4 of the district's plan reads, in pertinent part, as follows:
>
> > In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention or filing of a complaint or a formal charge upon which the defendant is to be tried... whichever is earliest.
>
> Consequently, as to the present indictment, the operable period in which the government was obligated to be ready for trial began on June 19, 1973, the day the indictment was filed.

At trial, the Government sought to prove that appellant was one of several principal participants in a narcotics importation scheme. The primary evidence against appellant was given by two minor participants in the scheme, Franklin Loqui-Chang and Raimundo Canas.

Loqui Chang testified that he was recruited in late 1971 by co-defendant Hidalgo to act as a courier for narcotics

importations from South America (218-34*). He related that in January 1972 he agreed to travel to Ecuador and that Hidalgo made the arrangements (236-42, 250). According to Loqui-Chang, Hidalgo left for Ecuador on March 14, 1972, and he (Loqui-Chang) left the following day (270-71). In Ecuador, Hidalgo gave Loqui-Chang vases containing secreted cocaine to bring back to the United States, and the cocaine was discovered by Customs inspectors in Miami upon Loqui-Chang's return to this country on February 25, 1972 (278).

Loqui-Chang testified that he twice saw appellant in the company of Hidalgo. The first meeting occurred in late 1971 when Hidalgo introduced appellant as his "partner" (224-25). Later, on February 13, 1972, Loqui-Chang saw appellant in Hidalgo's home, and drove with Hidalgo and appellant to see Hidalgo off at the airport for a trip to Ecuador (243, 270-71). Also, Hidalgo gave Loqui-Chang three telephone numbers to call upon his return to New York with the narcotics, one of which was appellant's number (263).

The Government demonstrated one additional connection between Hidalgo and appellant: a call was made from appellant's telephone to Hidalgo in Ecuador in mid-February 1972 (331). In addition, the Government proved a call from appellant's telephone to Oscar DeBruto in Ecuador, who participated in the scheme with Hidalgo (331).

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*Numerals in parentheses refer to pages of the trial transcript.

Evidence of another cocaine importation attempt was given by Raimundo Canas, who related that appellant recruited him to act as a narcotics courier for Canas in mid-1972 (80). According to Canas, appellant made all the preparations for a trip to Chile (89-107). In Chile, Canas was met by co-defendant Vera, who supplied the narcotics (122-28).

Canas was discovered with the cocaine by Customs inspectors upon his arrival on September 28, 1972, at Kennedy International Airport, and he agreed to pretend to continue with his delivery in order to identify his contact, who was as yet unknown (129). When Canas left the Customs area, agents noticed that Canas was being observed and followed by appellant and another man (40-44). Shortly thereafter, appellant was arrested (45).

Appellant introduced no evidence in his own behalf.

After deliberation, the jury found appellant guilty as charged.

ARGUMENT

THE GOVERNMENT VIOLATED THE PROMPT DISPOSITION RULES BY FAILING, WITHOUT A VALID EXCUSE, TO BE READY FOR TRIAL WITHIN SIX MONTHS OF APPELLANT'S ARREST.

Evidence introduced at the hearing held on the motion to dismiss the indictment for the Government's failure to comply with the District Court Plan for Achieving Prompt Disposition of Criminal Cases established the following sequence of events:

Appellant was arrested on September 28, 1972, and charged in a complaint with participation in a scheme to import cocaine. On October 10, 1972, he was released on bail. The complaint was dismissed on February 23, 1973, upon the Government's motion pursuant to Rule 48(a) of the Federal Rules of Criminal Procedure. Assistant United States Attorney Clarey asserted that the dismissal was necessitated by the refusal of Raimundo Canas, a courier in the importation scheme, to testify against appellant, although Canas had already been sentenced in January 1973 for his role in the scheme.* When Canas later

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*Both Clarey and Agent Daniocek asserted that Canas was interviewed three times before he agreed to cooperate: September 28-29, 1972, when Canas allegedly told of appellant's role in the scheme, but refused to testify; January 1973, when Canas allegedly asserted that he wouldn't testify for fear of his family's safety; and April 1973, when Canas was brought to New York from prison in Indiana.

agreed to testify against appellant, he was brought, on June 19, 1973, before the grand jury.* On that day, the grand jury indicted appellant for the same acts and transactions as were alleged in the earlier complaint. On July 24, 1973, the Government filed a notice of readiness for trial. Thus, a total of nine months and twenty-five days had elapsed between the date of appellant's arrest and the date the Government filed its notice of readiness.

Rule 4 of the Plan** requires the Government to be

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*There is a conflict in the Government's documents as to when and how Canas agreed to cooperate. The affidavits of Clarey and Daniocek assert that Canas "voluntarily" agreed to testify in late May 1973. On May 4, 1973, however, Clarey wrote a letter to Judge Zavatt joining in Canas' request for a reduction of Canas' eight-year sentence on grounds that he was cooperating with the Government. Canas' pro se motion was also dated May 4, 1973.

** 4. All Cases: Trial Readiness and Effect of Non-Compliance.

> In all cases the government must be ready for trial within six months from the date of arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such time, and if the defendant is charged only with a non-capital offense, the defendant may move in writing, on at least ten days' notice to the government, for dismissal of the indictment. Any such motion shall be decided with utmost promptness. If it should appear that sufficient grounds existed for tolling any portion of the six-month period under one or more of

ready for trial within six months of appellant's arrest, absent excusable neglect or other excludable periods. No valid excuses, however, were offered below by the Government.

The Government's principal argument below was that the six-month period should have been counted from the date of indictment rather than from the date of arrest. It is undisputed, however, that the original complaint and the indictment charge the same crimes. Also uncontroverted is the fact that the Government's decision to drop the complaint after five months of pendency was made because the Government believed that it could not go to trial because of the refusal of its primary witness to testify. However, there was available to the Government a judicial procedure to compel his testimony prior to the expiration of the six-month period. This Court has made clear that

> [t]he only way adequately to establish unwillingness of a witness to testify is to compel the presence

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> the exceptions in Rule 5, the motion shall be denied, whether or not the government has previously requested a continuance. Otherwise the court shall enter an order dismissing the indictment with prejudice unless the court finds that the government's neglect is excusable, in which event the dismissal shall not be effective if the government is ready to proceed to trial within ten days.

> of the witness and test the question before the court.
>
> United States v. Sanchez, 459 F.2d 100, 102 (2d Cir.), cert. denied, 409 U.S. 864 (1972).

See also United States v. Sperling, 362 F.Supp. 909, 911 (S.D. N.Y. 1973).

Under Sanchez, the proper procedure for the Government to have followed when it learned that Canas refused to testify before the grand jury despite the completion of the proceedings against him would have been to bring Canas before the grand jury. If, upon his appearance before the grand jury, he refused to testify, the Government should have sought a court order compelling his testimony. See United States v. Mara, 410 U.S. 19 (1973); Branzburg, v. Hayes, 408 U.S. 665 (1972).* A continued refusal would have returned Canas to the District Court for contempt proceedings. Thus, the Court would hold the "preliminary hearing" mentioned in United States v. Sanchez, supra, 459 F.2d at 102-03, at which time a federal district judge could have informed Canas of his rights and have determined whether Canas had a legitimate reason for refusing to testify. Since a full hearing would have been necessary to determine whether Canas properly was refusing to tes-

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*In United States v. Mara, supra, for example, the Government, following Mara's refusal to cooperate, obtained a court order directing Mara to furnish handwriting exemplars to the grand jury.

tify, Harris v. United States, 382 U.S. 162 (1965),* the Court could have determined whether Canas' fears were justified and whether the Government was offering him or his family adequate protection.**

The continued and unjustified refusal by Canas to testify could have resulted in a contempt citation. This procedure was intended by this Court as the legitimate means to test a witness' refusal to testify. As the Court noted, in United States v. Sanchez, supra, the majesty of the court often causes reluctant witnesses to change their minds, and the refusal to testify is not reason for a delay. 459 F.2d at 103. Failure to follow the procedure resulted in the very delay this Court sought to prevent.*** Instead of following the procedure, the Government dismissed the indictment under Rule 48(a), and later sought to justify its actions by explaining that it did not have Canas' testimony.

The use of a Rule 48(a) dismissal in order to avoid a default under Rule 4 of the Plan and the obtaining of a subsequent indictment for the same crimes raises the same problem faced by this Court in Hilbert v. Dooling, 476 F.2d 355 (2d Cir. en banc), cert. denied, 94 S.Ct. 56 (1973). There, the Government urged that a dismissal under the Second Circuit

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*It must again be noted that Canas had no Fifth Amendment rights because the prosecution against him was over.

**Protective custody is available to the Government.

***Sanchez was decided on May 2, 1972.

Rules Regarding Prompt Disposition of Criminal Cases* was without prejudice to reindict. In response, this Court ruled:

> If the Government were permitted to reindict after a Rule 4 dismissal, our Prompt Disposition Rules would for the most part be rendered a dead letter, since the Government would have less incentive to push forward to trial.
>
> Id., 476 F.2d at 358.

Similarly, the Government should not be allowed to terminate the running of the six-month period by a Rule 48(a) dismissal when it is expected that the prosecution cannot be ready for trial within six months. Dismissal and the bringing of subsequent, identical charges would allow a potentially endless series of delays over which a defendant would have no control. The District Court's decision would allow the Government at will to terminate, then recommence, the six-month period.

Rule 5 of the Plan, and the excusable neglect provision of Rule 4, detail the only allowable exceptions to the six-month rule. Every possible, legitimate delay, including the general "exceptional circumstances" provision of Rule 5(h), is covered. To allow the Government to go outside the Rules to obtain endless, unchallengeable delays, would subvert the purpose of the Rules:

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*For purposes of this argument the provisions of the Plan and the Rules are identical.

> ... [T]he Rules are designed to require the government to be ready to try cases promptly, subject to certain types of delay generally recognized as arising from legitimate or unavoidable causes. The purpose of Rule 4 is to insure that regardless whether a defendant has been prejudiced in a given case or his constitutional rights have been infringed, the trial of the charge against him will go forward promptly instead of being frustrated by creeping, paralytic procedural delays of the type that have spawned a backlog of thousands of cases, with the public losing confidence in the courts and gaining the impression that federal criminal laws cannot be enforced.
>
> Ibid., 476 F.2d at 357-58.

Further, Canas' refusal to testify against appellant under these circumstances is not sufficient to warrant an exception under Rule 5(c)(i) to the six-month requirement.*

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* 5. Excluded Periods.

> In computing the time within which the government should be ready for trial under Rules 3 and 4, the following periods should be excluded:
>
> (c) The period of time during which:
>
> (i) evidence material to the government's case is unavailable, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will become available within a reasonable period....

Throughout the relevant period Canas was in the custody of the United States Government, and thus "available" within the meaning of Rule 5(c)(i). Rule 5(c)(i) has been held to excuse the Government's failure to satisfy the six-month rule only when the witness is physically inaccessible to the Government. In United States v. Counts, 471 F.2d 422 (2d Cir.), cert. denied, 411 U.S. 935 (1973), the witness was unavailable because he was in Vietnam. Similarly, in United States v. Boatner, 478 F.2d 737 (2d Cir. 1973), the witness was unavailable because she was in Louisiana and pregnant, with advice from her physician not to travel. In United States v. Rollins, 487 F.2d 409 (2d Cir. 1973), this Court held that Rule 5(c)(i) did not apply to a witness who was physically available, but whom the Government chose not to call as a witness because he was under investigation.

Here, the Government could not claim either that the witness or the testimony was unavailable. The Government knew what Canas had to say, for he had told the agents, upon his arrest on September 28, 1972. That Canas eventually testified after receiving an extraordinary promise by the Government to assist him in obtaining a sharply reduced sentence undermines the argument of unavailability. Canas was indeed ready to testify if the rewards were great enough. His second pro se motion for reduction of sentence, filed on May 4, 1973, was obviously made with full assurance of assistance by the Government. This assistance came immediately with Clarey's letter

of May 4, 1973, and later, after Canas' grand jury testimony, with the late Mr. Morse's letter of June 29, 1973. The thrust of Sanchez, and the significance of the contempt proceeding is that Canas' testimony could have been obtained by threat of punhisment, as well as by the promised reward of a reduced sentence.

In conclusion, the Government violated the six-month rule by failing to follow the procedure for obtaining testimony from a reluctant witness. Had the Government followed United States v. Sanchez, supra, rather than relying on extraordinary promises, Canas' testimony could have been compelled in sufficient time to satisfy the speedy trial rules.*

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*The Government's claims for exceptions under Rule 5(d) due to appellant's fugitive status from June 19-24, 1973, and under Rule 5(e) due to the Government's efforts to find the co-defendant Hidalgo from June 19 to July 24, 1973, are without merit. These short periods of time do not reduce the total period of waiting to less than six months.

CONCLUSION

For the above-stated reasons, the judgment of the District Court should be reversed and the indictment should be dismissed.

Respectfully submitted,

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